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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NELSON GONZALES, Plaintiff and Appellant, v. STATE OF CALIFORNIA et al., Defendants and Respondents.	A142229 (San Mateo County Super. Ct. No. CIV 478319)

Plaintiff Nelson Gonzales led the California Highway Patrol (CHP) on a high speed chase that ended with him being shot by a CHP officer. Gonzales survived and sued the individual officer in federal court under title 42 United States Code section 1983 (section 1983) for using excessive force. A federal jury found that the officer did not use excessive or unreasonable force. Gonzales thereafter filed the state court action that gives rise to this appeal—a negligence claim against defendants CHP and the State of California (collectively, CHP). The trial court sustained the CHP's demurrer without leave to amend on the ground the federal judgment has a res judicata effect that bars Gonzales from pursuing his negligence claim in state court.

On appeal from the judgment in favor of the CHP, Gonzales argues the court erred because his state law claim encompasses *preshooting* negligence, whereas the section 1983 excessive force claim was focused more narrowly on the moment when deadly force was used. Further, he contends that he did not have an adequate opportunity to litigate his preshooting negligence claim against the CHP in the prior action because the Eleventh Amendment precluded him from suing the state in federal court. Consequently,

he asserts that he should not be precluded from pursuing a preshooting negligence theory against the CHP in state court.

Even assuming the federal judgment does not have the effect of barring Gonzales from pursuing a preshooting negligence claim in state court, the claim nonetheless fails as a matter of law. The basis for the preshooting negligence claim is that the officer should have taken cover instead of pursuing an arrest and thereby creating a situation in which it was reasonable for the officer to use deadly force. But California law has long established that an officer with probable cause to arrest is under no obligation to wait until a more favorable time to pursue the arrest, even if threatened with resistance. (Pen. Code, § 835a.) Because Gonzales may not premise his preshooting negligence theory on the officer's decision to pursue a lawful arrest, we shall affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

In reviewing an order sustaining a demurrer, we ordinarily take the factual background from the properly pleaded allegations of the complaint. (See *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) In this case, however, because the CHP's demurrer rests in part on a claim that a prior federal judgment bars Gonzales from pursuing his claims in state court, we must necessarily consider the prior action that purportedly has res judicata effect. (*Estate of Dito* (2011) 198 Cal.App.4th 791, 794.) Accordingly, we summarize the background of the prior federal action as well as the allegations at issue in this action.

As set forth in the operative first amended complaint in this action, in August 2006 CHP officer Michael Novosel attempted to pull over a vehicle Gonzales was driving. A high speed chase ensued. The vehicle Gonzales was driving left the road and became stuck in a rocky wooded area. The car's engine was roaring and the wheels were spinning, although trees, rocks, and a steel cable prevented Gonzales from making an escape in the vehicle. Various officers at the scene took cover and purportedly waited for direction from a supervisor, in compliance with training that directs an officer to await direction on how to apprehend a suspect without threatening the safety of the officers or the suspect. Officer Novosel allegedly ignored this training and approached the vehicle.

He shouted verbal commands that Gonzales claims could not be heard over the noise coming from the vehicle. Gonzales alleges that, by approaching the vehicle instead of taking cover, officer Novosel affirmatively created a potential risk in which almost any action by Gonzales could be used to justify the use of deadly force. Officer Novosel shot several rounds at Gonzales at close range, allegedly "in violation of his training to 'shoot and assess' after each round." As a result of a shot that shattered Gonzales's spine, he is permanently paralyzed below the middle of his chest.

Gonzales filed two lawsuits in 2007, one in federal court against officer Novosel and one in state court against the CHP. In the federal lawsuit, Gonzales asserted a section 1983 civil rights claim alleging that officer Novosel had used unreasonable force against him in violation of his rights under the Fourth and Fourteenth Amendments. As support for the cause of action, Gonzales alleged the same basic facts he alleges in the first amended complaint at issue here, without the allegations that officer Novosel ignored his training in approaching the vehicle. Instead, he alleged he was slumped over the wheel and that officer Novosel approached the vehicle and fired several shots "[w]ithout provocation or justification" after Gonzales failed to respond to the officer's verbal commands. Gonzales did not allege a negligence cause of action or name the CHP as a party in the federal action.

In the state lawsuit filed in 2007, Gonzales sued the CHP but not officer Novosel. He alleged a single cause of action for negligence based on the same general allegations contained in his federal complaint. The state suit was dismissed without prejudice at Gonzales's request in 2008. Gonzales claims he entered into a stipulation and tolling agreement with the CHP in 2008 that permitted him to first litigate his section 1983 claim against Novosel in federal court and then pursue his state law claims against the CHP in state court. As support for this claim, Gonzales included in the record on appeal a "stipulation and tolling agreement" providing, in relevant part, that the CHP agrees that Gonzales "may reserve his potential state law causes of action" against the CHP pending

resolution of the federal lawsuit.[1] The agreement further provides that the CHP agrees to waive a statute of limitations or laches defense should Gonzales decide to file a state action following the conclusion of the federal lawsuit.

Following the dismissal without prejudice of the state action, Gonzales's section 1983 lawsuit was tried before a jury in federal court. The jury returned a verdict in favor of officer Novosel, finding that the officer did not use excessive or unreasonable force against Gonzales. In November 2008, the federal court entered a final judgment in favor of officer Novosel on Gonzales's section 1983 excessive force claim.

Shortly after the federal court entered its judgment, Gonzales filed his second lawsuit in state court against the CHP. Like the first state lawsuit, the complaint in the second state lawsuit alleged a single cause of action for negligence against the CHP. The second state lawsuit is the subject of this appeal. CHP answered the complaint and alleged as an affirmative defense that the action is barred by the doctrines of collateral estoppel and res judicata. In July 2013,[2] Gonzales filed his first amended complaint, which includes allegations of preshooting negligence that had not been included in the earlier federal and state complaints. Those preshooting allegations, which are summarized above, include assertions that officer Novosel ignored his training and approached the vehicle instead of taking cover and waiting for further direction.

The CHP filed a demurrer to the first amended complaint. The CHP argued that Gonzales could not split his cause of action arising from the shooting between the federal and state courts, and it urged that the federal judgment barred his state claims. The CHP further argued that the jury's verdict in the federal action collaterally estopped Gonzales from pursuing his "shoot and assess" theory. Finally, the CHP contended that the jury in

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[1]We observe that the stipulation and tolling agreement was purportedly drafted by counsel for the CHP, although the only copies of that agreement contained in the record are not signed by the CHP or its counsel.

[2]According to the CHP, the delay between the filing of the original complaint and the filing of the first amended complaint in the second state lawsuit is attributable to a mandatory stay that remained in place while criminal charges remained pending against Gonzales. (See Pen. Code, § 945.3.)

the federal action had already determined that officer Novosel's use of deadly force was reasonable, and that officer Novosel's decision to approach the vehicle did not render an otherwise reasonable use of deadly force unreasonable.

The trial court sustained the CHP's demurrer without leave to amend. The court reasoned that Gonzales could not pursue his negligence claim in light of the Supreme Court's then-recent decision in *Hayes v. County of San Diego* (2013) 57 Cal.4th 622 (*Hayes*). As the trial court interpreted *Hayes*, Gonzales could not premise an independent negligence claim on the preshooting decision to approach the vehicle because that decision caused no injury independent from the later use of force.

After the trial court entered judgment in favor of the CHP, Gonzales timely appealed.

DISCUSSION

1. *Standard of Review*

We apply two separate standards of review when considering a trial court order sustaining a demurrer without leave to amend. (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 791.) We first assess whether the complaint contains facts sufficient to state a cause of action under any legal theory. (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.) " ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." ' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale." (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631.)

If the facts as pleaded do not state a cause of action, we then consider whether the court abused its discretion in denying leave to amend the complaint. (*McClain v. Octagon Plaza, LLC, supra*, 159 Cal.App.4th at pp. 791–792.) It is an abuse of discretion to sustain a demurrer without leave to amend when the plaintiff has demonstrated a

reasonable possibility the defect can be cured by amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

2. *Hayes v. County of San Diego*—*Comparing State Negligence Law to Federal Fourth Amendment Law*

Gonzales's appeal is largely premised on a claimed distinction between standards applicable to a state law negligence claim and a federal excessive force claim based on the Fourth Amendment. He argues that our Supreme Court's decision in *Hayes, supra,* 57 Cal.4th 639 supports his position and allows him to pursue a negligence claim in state court even though a federal jury has already rejected his excessive force claim.

Hayes arose out of a federal court action brought by the daughter of a man who was killed after sheriff's deputies entered his house to conduct a welfare check. (*Hayes, supra,* 57 Cal.4th at pp. 625–626.) The deputies shot and killed the man after he came toward them with a large knife. (*Id.* at p. 625.) The daughter alleged federal excessive force claims under the Fourth Amendment as well as state law negligence claims. (*Id.* at pp. 626–627.) The federal district court granted summary judgment in favor of the defendants on all the claims. (*Id.* at p. 627.) With respect to the federal claims, the court concluded as a matter of law that the deputies' use of deadly force was reasonable under the Fourth Amendment. The court likewise ruled that the use of deadly force was reasonable under state law in light of the decedent's threatening conduct. The court rejected an argument that the deputies were negligent in provoking the dangerous situation that necessitated the use of force, ruling that the deputies owed the decedent no duty of care with respect to preshooting conduct. (*Ibid.*) In the appeal from the summary judgment, the United States Court of Appeals for the Ninth Circuit asked our Supreme Court to decide as a matter of California negligence law whether officers owe a suicidal person a duty of care when performing a welfare check. (*Id.* at p. 626.) The Supreme Court restated the question as whether " 'liability can arise from tactical conduct and decisions employed by law enforcement *preceding the use of deadly force*.' " (*Ibid.,* italics added.)

The Supreme Court in *Hayes* held that "tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of the circumstances, that the use of deadly force was unreasonable." (*Hayes, supra*, 57 Cal.4th at p. 639.) The court explained that, where preshooting conduct does not cause any injury independent of the injury resulting from shooting, the preshooting conduct should not be consideration in isolation but should be considered "in relation to the question whether the officers' ultimate use of deadly force was reasonable." (*Id.* at p. 632.)

In reaching its conclusion, the *Hayes* court acknowledged that state and federal law standards are different with respect to whether the use of force is reasonable. Whereas state negligence law "considers the totality of the circumstances surrounding any use of deadly force," federal Fourth Amendment law "tends to focus more narrowly on the moment when force is used . . . ." (*Hayes, supra*, 57 Cal.4th at p. 639.) For example, an officer's preshooting conduct may negligently provoke a dangerous situation that causes the officer to use his firearm. Even if the use of force is considered reasonable under Fourth Amendment law, which does not focus on preshooting conduct that may have provoked a dangerous situation, the use of force might be considered unreasonable under state negligence law when the totality of the circumstances, including the preshooting conduct, is taken into account.

We agree with Gonzales that *Hayes* stands for the proposition that a state law negligence claim based upon the use of deadly force is broader than a federal Fourth Amendment excessive force claim. This conclusion, however, does not answer the further question of whether a final federal court judgment denying an excessive force claim under the Fourth Amendment precludes a state court negligence action based upon the same injury. That question turns upon the application of res judicata principles, which we turn to next.

3. *Res Judicata*

" 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argues and decided in prior proceedings.' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.)

When a federal court renders a judgment while acting within its federal question jurisdiction, as the federal district court did here, California courts must give to that judgment the same preclusive effect the judgment would have in a federal court. (*Taylor v. Sturgell* (2008) 553 U.S. 880, 891; *Semtek Int'l v. Lockheed Martin* (2001) 531 U.S. 497, 507; *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1452.) Accordingly, we apply federal law in determining the preclusive scope of the federal judgment.

"Generally 'under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.' " (*Manufactured Home Communities v. City of San Jose* (9th Cir. 2005) 420 F.3d 1022, 1031.) The elements necessary to establish *res judicata* are: " '(1) an identity of claims, (2) a final judgment on merits, and (3) privity between the parties.' " (*Headwaters Inc. v. U.S. Forest Service* (9th Cir. 2005) 399 F.3d 1047, 1052.)

Gonzales argues that he did not have an adequate opportunity to litigate preshooting negligence against the CHP in federal court because the Eleventh Amendment precluded him from suing the state or state officials acting in their official capacities. (*Hafer v. Melo* (1991) 502 U.S. 21, 25.) He was limited to suing officer Novosel in federal court in his individual capacity. Because he did not have the opportunity to litigate preshooting negligence against the state in federal court, Gonzales contends he should not be precluded from doing so in state court.

As the CHP points out, Gonzales could have pursued a preshooting negligence claim against officer Novosel in his individual capacity in federal court. Thus, Gonzales had an opportunity to litigate the issue of preshooting negligence in the federal action; he

simply chose not to do so. There is little doubt that the res judicata requirements of an identity of claims and a final judgment on the merits are satisfied. But the more troublesome question is whether the third element of the res judicata analysis is met—privity between the parties. More specifically, the issue is whether the CHP can assert the preclusive effect of the federal judgment as a party in privity with officer Novosel acting in his individual capacity.

The CHP argues that it is in privity with officer Novosel because it is vicariously liable for his actions. (See *Saudi Arabia v. Nelson* (1993) 507 U.S. 349, 376 [judgment against either party to vicarious liability relationship establishes preclusion in favor of the other].) The argument might have merit if we were considering a suit against the officer in his official capacity, but the CHP is not vicariously liable for an official's conduct performed in his or her individual capacity. (Cf. *City of Canton, Ohio v. Harris* (1989) 489 U.S. 378, 385 [respondeat superior or vicarious liability does apply to section 1983 actions].) This distinction explains why a "judgment against an official who has litigated in his personal capacity is not binding on his government." (18A Wright et al., Federal Practice and Procedure (ed. 2002) § 4458, at p. 572; see *Gray v. Lacke* (7th Cir. 1989) 885 F.2d 399, 404–406.) It is true that the CHP is required by Government Code section 825 to defend and indemnify an employee who is sued for acts or omissions occurring within the scope of that employee's employment, but a relationship in which a party is bound by statute to indemnify the other is different from one in which the party is vicariously liable for the other's actions. The CHP has cited no authority for the proposition that an indemnification relationship establishes privity for purposes of applying res judicata.[3]

[3]At oral argument on appeal, CHP's counsel claimed the privity issue is easily resolved by relying on *City of Los Angeles v. Superior Court* (*Levy*) (1978) 85 Cal.App.3d 143. We are not convinced. *Levy* applies California and not federal law governing the application of res judicata. The basis for applying res judicata in that case was that a county and city were "vicariously liable" for any judgment that might have been rendered against an employee. (*Id.* at p. 154.) But the decision ignores the critical difference in federal res judicata law between being sued in an individual capacity and an

The CHP also cites a Ninth Circuit case, *Adams v. California Department of Health Services* (9th Cir. 2007) 487 F.3d 684, for the proposition that individual state employees are entitled to the preclusive effect of a prior judgment in favor of the state because the state's liability was predicated on the employees' wrongdoing. *Adams* is no longer good law on this point. In *Adams,* the Ninth Circuit relied upon a theory that the employee defendants were in privity with the state because the state had virtually represented them in the earlier action. (*Id.* at p. 691.) In *Taylor v. Sturgell*, *supra*, 553 U.S. at page 904, the United States Supreme Court disapproved of the theory of "virtual representation" as a basis for asserting privity.

We are left to conclude that, for purposes of assessing the preclusive effect of the federal judgment, the CHP has failed to establish that it is in privity with officer Novosel, who was sued in his individual capacity in the federal lawsuit. Accordingly, the CHP is not entitled to assert the preclusive effect of the prior judgment in favor of officer Novosel where he was sued in his individual capacity.

The CHP argues that Gonzales should not be able to pursue his negligence claim now because it was his tactical choice to proceed with a federal action in which he was precluded from suing the state under the Eleventh Amendment. The CHP claims Gonzales effectively forfeited his right to pursue his state lawsuit by choosing to file two different actions when, instead, he could have had all of his claims adjudicated in state court from the outset. The CHP relies on *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441 (*Mattson*), in which the Court of Appeal held that a prior federal judgment adjudicating federal civil rights claims precluded a subsequent negligence claim filed in state court, even though the federal court had expressly declined to exercise pendent jurisdiction over the state law claims. (*Id.* at pp. 447–456.) The court reasoned

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official capacity. Under federal law, a government official sued in his individual capacity is not considered in privity with the government. (See *Gray v. Lacke, supra,* 885 F.2d at pp. 404–406.) Here, Gonzales could have sued officer Novosel for state law negligence in federal court, but only in the officer's individual capacity. A suit against the officer in his official capacity would have effectively been a suit against the state and thus barred by the Eleventh Amendment. (See *Hafer v. Melo*, *supra,* 502 U.S. at p. 25.)

that the plaintiff could have pursued all of his claims in state court after the federal court refused to exercise pendent jurisdiction over the state law claims. (*Id.* at p. 454.) By electing to proceed first in federal court, the plaintiff could effectively manipulate the system and reserve a second chance to prevail in state court if he were unsuccessful in federal court. (*Id.* at p. 455.)

It is tempting to rely on *Mattson* as a basis to preclude Gonzales's state court negligence action. After all, it was his choice to pursue his claim in federal court knowing that he could not pursue his state law claims against the CHP in that forum. But *Mattson* is premised on standard res judicata principles. (*Mattson, supra,* 106 Cal.App.3d at p. 446.) It simply recognizes that litigants should not be able to avoid the preclusive effect of a prior judgment by claiming they were unable to raise an issue in prior litigation when that inability results from their own tactical choices. In other words, *Mattson* focuses on the aspect of res judicata that governs its application when a party is precluded from fully litigating its claims in a single forum. *Mattson* does not allow a party to rely on that principle to avoid res judicata when the party could have had all of its claims adjudicated in one forum. The *Mattson* decision does not otherwise relax the requirements to establish res judicata, and it does not dispense with the privity requirement. Here, the fact remains that the CHP has failed to establish that it was in privity with a party to the prior litigation. Accordingly, it is not entitled to assert that the federal judgment has res judicata effect, even though it may appear that Gonzales's tactical choice to pursue his federal lawsuit first has effectively given him a second bite at the apple in state court.[4]

We observe that, although the CHP cannot rely on res judicata to assert that the federal judgment bars Gonzales's *preshooting* negligence claim, it may still rely on the

[4]In light of our conclusion, it is unnecessary to consider the effect of the parties' stipulation and tolling agreement, which Gonzales claims permitted him to reserve his state law claims even if they would otherwise be precluded as a result of the res judicata effect of the federal judgment. We also deny as moot Gonzales's request for judicial notice of documents that purportedly bear upon the interpretation of the stipulation and tolling agreement.

doctrine of collateral estoppel to preclude Gonzales from relitigating the issue of whether the *shooting itself* involved the use of unreasonable force. Indeed, Gonzales concedes that he is bound by the prior adjudication of this issue. This is so because party or privy status is not a prerequisite to the invocation of the doctrine of collateral estoppel. (*Pena v. Gardner* (9th Cir. 1992) 976 F.2d 469, 472.)

4. *Liability for Preshooting Conduct*

The CHP argues that, even if the federal judgment does not preclude Gonzales's state law action on res judicata grounds, the preshooting negligence claim alleged by Gonzales nevertheless fails as a matter of law. The CHP contends that officer Novosel's preshooting decision to approach Gonzales's vehicle was reasonable as a matter of law and protected by statutory and decisional law protecting peace officers who have reasonable cause to arrest a suspect. For the reasons that follow, we agree with the CHP.

The California Supreme Court has rejected the argument that a preshooting negligence claim may be premised on the pursuit and arrest of a suspect when there is reasonable cause to believe the suspect has committed a public offense. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 517–521 (*Hernandez*).) In *Hernandez,* a suspect fled from police first by car and then on foot. The suspect was shot and killed. (*Id.* at pp. 506–507.) His parents and children were plaintiffs in a section 1983 claim brought in federal court against the officers. (*Id.* at pp. 507–508.) A judgment was entered in favor of the officers on the excessive force claim. (*Id.* at p. 509.) After the federal court declined to exercise supplemental jurisdiction over the plaintiffs' state law claims, the plaintiffs filed suit in state court against the same officers alleging a wrongful death claim. (*Ibid.*) The Supreme Court held that the federal proceedings collaterally estopped the plaintiffs from recovering on the theory that the officers acted negligently in using deadly force. (*Id.* at p. 517.) The Supreme Court then considered whether the officers' preshooting conduct negligently created a situation in which it was reasonable to use deadly force. (*Ibid.*)

The *Hernandez* court concluded that, in light of the finding the shooting was reasonable, liability could not be based on the officers' alleged preshooting negligence.

(*Hernandez, supra,* 46 Cal.4th at p. 518.) Plaintiffs alleged, among other things, that the officers chased the decedent into a darkened parking lot. (*Id.* at p. 520.) The court denied the preshooting claims as a matter of law, stating: "Long ago, we explained that an officer with probable cause to make an arrest ' " ' "is not bound to put off the arrest until a more favorable time" ' " ' and is ' " 'under no obligation to retire in order to avoid a conflict.' " ' " (*Id.* at p. 518.) "Instead, an officer may 'press forward and make the arrest, using all force reasonably necessary to accomplish that purpose.' " (*Ibid.*)

The legal principles relied upon in *Hernandez* are codified in Penal Code section 835a, which provides as follows: "Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. [¶] A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance."

Just as in *Hernandez,* officer Novosel's decision to approach Gonzales's vehicle in order to conclude the chase and make an arrest does not transform what was an otherwise reasonable use of force, as the federal jury found, into an unreasonable use of force. Penal Code section 835a plainly states that an officer is not required to retreat or desist from efforts to make an arrest, even if the suspect threatens to resist. Officer Novosel knew Gonzales had unlawfully fled from a traffic stop and therefore could be lawfully arrested. Gonzales does not claim the officer lacked probable cause to conduct the arrest and has no basis to make such a claim. Gonzales's allegation that officer Novosel acted unreasonably in approaching him instead of seeking cover is directly at odds with the protections afforded by Penal Code section 835a and *Hernandez.* There is no allegation that officer Novosel used force, much less unreasonable force, in the time period leading up to the actual shooting. Nor on these facts would we conclude that Gonzales was contained and no longer posed a threat of flight or injury.

Gonzales contends that *Hernandez* and Penal Code section 835a are inapplicable here because their effect is limited to situations in which the suspect is actively fleeing. According to Gonzales, the principle discussed in *Hernandez* does not apply when the suspect has been contained, such as in *Hayes*, in which the decedent who was the subject of a welfare check was in his house.

We are not persuaded that *Hernandez* and Penal Code section 835a are limited in application to situations in which a suspect is actively fleeing. By its terms, Penal Code section 835a applies to efforts to make an arrest and overcome resistance, not just to prevent escape. Further, in holding that the court had "[l]ong ago" explained that an officer with probable cause to make an arrest is not bound to retreat in order to avoid a conflict, the *Hernandez* court relied on a case that did not involve a chase or attempted escape. (*Hernandez, supra*, 46 Cal.4th at p. 518; see *People v. Hardwick* (1928) 204 Cal. 582, 585.)

There may be circumstances in which an officer's preshooting conduct gives rise to negligence liability, despite an otherwise reasonable use of deadly force. One such circumstance may arise when the officer does not have probable cause to make an arrest. For example, in *Hayes*, the deputies were performing a welfare check when the subject of their inquiry came at them with a knife. (*Hayes, supra*, 57 Cal.4th at p. 626.) In a case relied upon by Gonzales, *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 581, officers sought to pull over a driver for questioning but did not intend to arrest him for traffic violations. The driver was apparently startled when he saw that a plainclothes officer was holding a shotgun and attempted to flee in his car when the officer showed him his badge. (*Id.* at pp. 581–582.) The driver was shot and killed after causing the officer with the shotgun to fear that the car was headed in the direction of another officer. (*Id.* at p. 582.) Neither *Hayes* nor *Grudt* involved a decision to effectuate a lawful arrest. *Hernandez* and Penal Code section 835a consequently did not apply.

We conclude that the alleged conduct of officer Novosel leading up to the shooting does not provide a basis for a preshooting negligence claim under *Hayes*, bearing in mind that the federal jury has already determined that the use of deadly force

itself was reasonable under the circumstances. Because Gonzales has not demonstrated any reasonable possibility that the defect in the first amended complaint can be cured by amendment, it was not an abuse of discretion to sustain the demurrer without leave to amend.

DISPOSITION

The judgment is affirmed. Respondents shall be entitled to recover their costs on appeal.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.

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